

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 6, 2008 Session

**EDWIN GRAYBEAL, JR., SHERIFF, WASHINGTON COUNTY, ET AL. v.
TENNESSEE DEPARTMENT OF HUMAN SERVICES**

**Appeal from the Chancery Court for Davidson County
No. 06-2671-I Walter C. Kurtz, Judge**

No. M2007-02320-COA-R3-CV - Filed May 26, 2009

Local officials appealed to the Chancery Court the decision by the Secretary of State that the Department of Human Services has a statutory priority under Tenn. Code Ann. § 71-4-501 *et seq.* to operate the inmate commissary at the local detention facility with blind vendors. We affirm the Chancery Court's finding that the inmate commissary is subject to the statutory priority.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

John Rambo, Jonesborough, Tennessee, for the appellants, Edwin Graybeal, Jr., Sheriff, Washington County, et al.

Robert E. Cooper, Jr., Attorney General and Reporter; Pamela A. Hayden-Wood, Senior Counsel, for the appellee, Tennessee Department of Human Services.

OPINION

This appeal concerns whether the Washington County Detention Center is subject to Tenn. Code Ann. § 71-4-501 *et seq.*, which allows the Department of Human Services to require the provision of vending services by blind vendors at specified locations throughout government by the statutory grant of a priority.

The Washington County Detention Center ("WCDC") is a detention facility operated by Washington County. In July of 2003, the Director of Services for the Blind and Visually Impaired in the Department of Human Services ("DHS" or "Department") contacted Washington County Sheriff Edwin Graybeal by letter to discuss the possibility of having a licensed blind vendor manage the inmate commissary services of the WCDC when the existing provider's contract expired in

October of 2003. Despite the County's initial apparent reluctance, a meeting was held between representatives of DHS and Washington County on October 21, 2003. At that meeting, DHS learned that the County had entered into a contract with the existing provider to continue to manage the commissary operation of WCDC.

On November 5, 2003, the Director notified the Sheriff of the intent by DHS to operate the WCDC commissary with a blind vendor but offered to work with county representatives on a mutually satisfactory transition. There subsequently occurred a litany of phone calls, meeting scheduling mishaps, and failed efforts to reach a compromise throughout 2004.

Under Tenn. Code Ann. § 71-4-507, the Secretary of State is vested with authority to resolve disputes between property managers and DHS concerning the blind vendors program. On December 8, 2004, DHS filed a complaint against representatives of Washington County asking the Secretary of State to find that the WCDC is subject to the statutory priority granted to DHS under Tenn. Code Ann. § 71-4-501 *et seq.*¹ The Initial Order by the administrative law judge granted DHS summary judgment, which was not disturbed in subsequent requests for reconsideration. In addition to finding that the WCDC was subject to the priority, the Initial Order also found that DHS has "the ultimate authority" to decide the type of computer software that would be used in the operation of the inmate commissary.

After denial of their request for reconsideration, the Washington County officials appealed to the Secretary of State as allowed by Tenn. Code Ann. § 71-4-507. The Secretary of State issued a Final Order on September 7, 2006, whereupon the Secretary found that the WCDC was subject to the statutory priority of Tenn. Code Ann. § 71-4-501 *et seq.* and that DHS has ultimate authority to determine all aspects of the operation of the vending facility, including the software.² In addition, the Secretary assessed attorneys' fees against the Washington County officials pursuant to Tenn. Code Ann. § 48-101-514(c)(5).

Thereafter, the Washington County Sheriff, the Chief of the Washington County Sheriff's Office and the County Mayor (collectively "WCDC Petitioners") filed with the trial court a petition to review the administrative decision in November 2006. Upon review of the record made at the administrative proceedings, on September 4, 2007, the trial court upheld the decision of the Secretary of State, except for the award of attorneys' fees, which was reversed. WCDC Petitioners appeal the trial court's finding that WCDC Petitioners are bound by Tenn. Code Ann. § 71-4-501 *et seq.*, allowing DHS to require that the WCDC commissary be operated under the program for the blind. The issue of attorneys' fees was not raised on appeal.

¹DHS named as respondents the Washington County Sheriff, the Chief of the Washington County's Sheriff's office, and the County Mayor.

²The Secretary was clear, however, that WCDC was free to use others' software for other purposes and the Respondents were not required, of course, to compromise issues of safety.

I. STANDARD OF REVIEW

The statute that provides the Secretary of State with authority to resolve disputes between the local government and DHS requires that a hearing be held under the Uniform Administrative Procedure Act, Tenn. Code Ann. § 4-5-301 *et seq.*; Tenn. Code Ann. § 71-4-507(a). Any order resulting from the process is subject to judicial review as provided by Tenn. Code Ann. § 4-5-322.

Accordingly, judicial review is confined to the Department's record. Tenn. Code Ann. § 4-5-322(g); *McClellan v. Board of Regents of State University*, 921 S.W.2d 684, 690 (Tenn. 1996). A court may reverse or modify the administrative decision if the rights of the petitioner have been prejudiced because the decision was made in violation of constitutional or statutory provisions, in excess of the statutory authority of the agency, upon unlawful procedure, was arbitrary or capricious or characterized by abuse of discretion, or if the decision is unsupported by substantial and material evidence in the record. Tenn. Code Ann. § 4-5-322(h); *Humana v. Tennessee Health Facilities Commission*, 551 S.W.2d 664, 667 (Tenn. 1977). The standard of review for administrative proceedings before this court is the same as it is before the trial court. *Robertson v. Tenn. Bd. of Social Worker Certification and Licensure*, 227 S.W.3d 7, 13 (Tenn. 2007); *Metro. Gov't of Nashville & Davidson County v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977).

An allegation under Tenn. Code Ann. § 4-5-322(h)(l) that an agency decision was made in violation of a constitutional or statutory provision raises questions of law. Where resolution of an issue presented in a judicial review of an administrative decision under the UAPA hinges upon the interpretation and application of a statute or constitutional provision, courts will review the question *de novo*. *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002); *Bellsouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 672 (Tenn. Ct. App. 1997) (stating that "the search for the meaning of statutory language is a judicial function").

II. ANALYSIS

The question presented is a legal issue - namely, whether DHS has a statutory priority under Tenn. Code Ann. § 71-4-501 *et seq.* so that DHS may establish the inmate commissary at WDCD as a vending facility to be operated by a blind vendor.

The statutory scheme granting priority to blind vendors in public facilities is found in Tenn. Code Ann. § 71-4-501 *et seq.* ("Act"). The legislature's express purpose in passing the Act was to "grant to blind individuals a priority in the establishment and operation of vending facilities on public property in this state." Tenn. Code Ann. § 71-4-501. To that end, the Act is to be "liberally construed to give the blind individuals who are eligible for such priority the greatest possible opportunities to operate such vending facilities." Tenn. Code Ann. § 71-4-501. The Act gives DHS the authority to establish priority for blind vendors:

Whenever any new buildings or other facilities are to be constructed by the state or on any other public property or when **any existing contracts expire or are changed**

in any way, the department shall be notified and it shall promptly make an investigation and survey of the public property to determine if, in its judgment, the location is suitable for one (1) or more vending facilities. If, **in the department's judgment**, the location is suitable for a vending facility, the department **may exercise its priority to establish such a vending facility**.

Tenn. Code Ann. § 71-4-503(a) (emphasis added).

The Act further explains the nature of the “priority” accorded by the statutory program as follows:

“Priority” means the right of the department **to establish on any public property a vending facility to be operated by a blind individual**. This priority means that when the department has surveyed a public property and determined that such property is suitable for the location of a vending facility, it shall have the **right of first refusal and the exclusive right to the operation of any and all vending facilities on any public property** that it determines are capable of being operated by a blind individual that it licenses, or by an individual who may be operating the facility as a temporary manager until a licensed blind individual can assume the operation of the vending facility. Except as provided in subdivision (4) and §§ 71-4-504--71-4-506, the priority shall apply to all existing, altered, or new buildings, facilities, or grounds. This priority shall be exercised exclusively by the department in its sole discretion on behalf of legally blind individuals who are qualified and licensed as vending facility managers by the department and who are deemed capable of **providing the type of service required by the management** of the public property;

Tenn. Code Ann. § 71-4-502(3) (emphasis added).

According to the WCDC Petitioners, the Act does not apply to the inmate commissary because two statutory requirements of the Act were not met. First, they argue there must be an on-site manager or presence of some sort in order for the Act to be applicable. Second, they assert that the area housing the inmates is not “public property.”

Whether the Act is applicable to WCDC or any other commissary operation hinges on the statutory definitions provided for interpretation of the Act. In construing the relevant provisions, we are provided with two statutory construction principles which are applicable. First, the Act requires that we construe it “liberally” to give blind individuals “the greatest possible opportunities” to provide services. Tenn. Code Ann. § 71-4-501.

Second, we have the interpretation of DHS, which is to be considered since it is the agency responsible for implementing its terms. DHS relies on authority for the proposition that courts afford “deference” and “controlling weight” to an agency’s interpretation of its own rules and regulations

unless plainly erroneous or inconsistent with the regulation. *Jackson Express Inc. v. State Public Service Commission*, 679 S.W.2d 942, 945 (Tenn. 1984). While such is the case with interpretation by an agency of its *own rule*, the weight given an agency's interpretation of a *statute* is different. An agency's interpretation of a statute that it administers or enforces is "entitled to consideration and respect" but not necessarily "deference." *H&R Block Eastern Tax Services, Inc. v. Tennessee Department of Commerce and Insurance*, 267 S.W.3d 848, 854-55 (Tenn. Ct. App. 2008); *Kidd v. Jarvis Drilling, Inc.*, M2004-00973-COA-R3-CV, 2006WL 344755, at *4 (Tenn. Ct. App. Feb. 14, 2006).

The Act defines "Vending facility" as follows:

(5) "Vending facility" means a location or structure or space that may sell foods, beverages, confections, newspapers, periodicals, tobacco products, and other articles and services that are dispensed automatically by a machine or manually by sales personnel or attendants and that may be prepared on or off the premises in accordance with applicable health laws. A "vending facility" may consist, exclusively or in appropriate combination as determined by the department, of automatic vending machines, cafeterias, snack bars, catering services, food concession vehicles, cart services, shelters, counters, and any appropriate equipment necessary for the sale of articles or services described in this subdivision (5). A "vending facility" may encompass more than one (1) building on a public property.

Tenn. Code Ann. § 71-4-502(5).

As to their first argument, we conclude that WCDC Petitioners' interpretation of the Act is too narrow and that the legislature did not intend "vending facilities" to require an on-going physical presence at the facility. Clearly, the Act anticipates that blind individuals will participate off-site with limited, if any, on-site presence, as evidenced by use of vending machines and reference to off-site preparation in Tenn. Code Ann. § 71-4-502(4). Read as a whole, we believe "vending facilities" is intended to describe a type of service. Under the Act, where the service is performed is not its defining characteristic. The service is for use on "public property," but it is not required that there be a physical presence at the property by the blind individual.³

Additionally, as set out above, the relevant statute clearly provides that the "priority shall be exercised exclusively by the department in its sole discretion on behalf of legally blind individuals who are qualified and licensed as vending facility managers by the department and who are deemed capable of **providing the type of service required by the management** of the public property." Tenn. Code Ann. § 71-4-502(3) (emphasis added). Consequently, it is important to consider the type of service required by the managers of the detention facility.

³From the record it is clear that the Department has exercised its statutory priority over other inmate commissaries.

Under the current contract commissary items are provided to inmates through a private contractor. It is undisputed that under the existing contract the inmates are given order forms that are collected by WCDC employees. These order forms are then sent to the private contractor who assembles the order and charges the inmate account for the order. The contractor then sends the ordered items to WCDC employees, who distribute them to the inmates. Thus, the management of the facility has determined that the commissary can be operated by a third party without an onsite presence.

The WCDC Petitioners' second argument that the Act is inapplicable to inmate commissary because commissary activities do not take place in an area open to the public likewise fails. Tennessee Code Annotated § 71-4-503(a) applies to "public property." In order to be considered "public property" under the Act, WCDC must be "property owned or operated by . . . any county . . . to perform a public function." Tenn. Code Ann. § 71-4-502(4). Thus, the definition of "public property" does not hinge on access but, instead, on function.

The WCDC is a facility operated by the County which performs a public function, *i.e.* detention. There is no dispute that operation of a jail is a public function. Consequently, we conclude, as did the trial court, that the WCDC is "public property" included within the Act.

Based on the above reasoning, we conclude that the trial court correctly affirmed the decision by the Secretary of State that the statutory priority of the Act applies to the inmate commissary at the WCDC. The objections of the WCDC Petitioners, however, do not end with this finding. The WCDC Petitioners argue alternatively that, even if the inmate commissary at the WCDC is subject to the statutory priority of the Act, the Department's proposal exceeds its authority in two ways.

First, the WCDC Petitioners argue that the Act does not empower the Department to require WCDC Petitioners to use its guards or personnel to take orders from or distribute items to the inmates. In other words, WCDC Petitioners argue that the Department cannot commandeer the WCDC employees to do its bidding in furtherance of blind vendors providing the concessions to WCDC inmates. The WCDC Petitioners make an argument that might be compelling in other circumstances.

We agree, and the Department conceded, that it cannot order the Sheriff to use his employees to perform services for the blind vendors. That is not, however, the situation here. The WCDC Petitioners have decided that the jail will provide concession services for inmates by contracting the service to a third party. As part of that contractual arrangement with any third party, the WCDC Petitioners decided WCDC employees are to take the concession orders from inmates and deliver the items to the inmates. This is the contractual arrangement the WCDC is offering to third parties, and it is this contractual arrangement to which the Department claims a priority for blind vendors.

The Department is not arguing that the WCDC must require its guards to perform the intake and distribution role.⁴ The WCDC has made this decision. The Department is simply saying that if the WCDC is going to contract with a third party contractor to provide concessions to inmates and use guards to do intake and distribution of those items, then the Act gives the blind vendors a priority on that contract if the Department so decides.

Second, the WCDC Petitioners argue that they cannot be forced to use a different vending software than the one they current use. The WCDC Petitioners explain that allowing the blind vendors to perform the commissary tasks currently by a private contractor is difficult due to issues surrounding computer software. The WCDC Petitioners argue that the software used by the existing contractor includes applications in addition to tracking commissary items that WCDC uses for other purposes related to operating the detention facility. They argue that requiring them to change software would cause practical problems.⁵

There is no requirement in the Department's proposal, however, that WCDC switch all its software, only the software pertaining to the inmate commissary. Furthermore, the Act contains no exceptions if its compliance causes inconvenience or administrative burdens. The legislature clearly intended to expand the reach of this program regardless of practical difficulties. WCDC Petitioners already contract the commissary service out to a private contractor. The question really is which outside vendor will perform the commissary service, and the Act allows the Department to exercise its priority to establish a blind vendor. Based on the record made below, DHS is proceeding in a reasonable way in an effort to work with WCDC Petitioners.

The trial court is affirmed. Costs of the appeal are taxed to appellants, Edwin Graybeal, Jr., Sheriff, Washington County, the Chief of the Sheriff's Office, and the County Mayor, for which execution may issue if necessary.

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⁴ Similarly, the Department is not arguing that the WCDC must provide concession services to inmates. Again, that is a decision made by the Sheriff.

⁵ Clearly, all matters related to jail security remain with the WCDC Petitioners. Respondents argue a "security problem" arises with the software used by the Department for inmate commissaries. This problem, however, does not pertain to jail security, but rather to audit responsibility.